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January 31, 2007

VIA HAND-DELIVERY

Mr. Mark Allen
General Counsel's Office
Federal Election Commission
999 E Street, N.W.
Washington, DC 20436

Re: MUR 5542 – Texans for Truth

Dear Mr. Allen:

Enclosed are three copies of the Response of Texans for Truth to the General Counsel's Brief in MUR 5542.

Please contact me at (202) 778-4040 if you have any questions.

Sincerely,

Eric Kleinfeld
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Patricia Fiori
Karen Zeglis
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Washington, DC 20036

Counsel for Texans for Truth

SUMMARY OF THE TEXANS FOR TRUTH RESPONSE
January 31, 2007

- TFT was not a federal political committee in 2004 and therefore was not required to register and report. It did not receive contributions as defined under the Act.

- TFT's solicitations did not cause the funds received by the organization to be converted to contributions.

- It is legally impermissible for the Commission to apply retroactively its regulation at 100.57, which was adopted after the TFT communications were made.

- OGC relies on three TFT solicitations, which were all sent via email, and as such are exempt as Internet activity. TFT did not solicit through direct mail or any other form of general public political advertising.

- Each of the emails cost approximately $65 to prepare and send. TFT email solicitations did not contain language referring to voting, an election, or a candidacy and therefore did not constitute express advocacy.

- The court case relied upon by OGC, *Survival Education Fund*, does not stand for the proposition cited, and, in fact, supports TFT's position, since that court expressly recognized that unregulated speech includes contributions raised to run ads that criticize a federal candidate, as long as the ads did not constitute expenditures.

- OGC admits that TFT's three ads were not expenditures and does not claim that TFT made any expenditures under the Act.

- OGC does not claim that TFT 's ads contained express advocacy and does not cite to the Commission's express advocacy regulation at 100.22 to support its position. Nor does OGC rely on any case law to support its proposition that "campaign spending" in the form of critical ads is sufficient to establish political committee status.

- TFT's ads did not contain language referring to voting, an election, or a candidacy, but, instead, were intended to raise public awareness about the war in Iraq.

- TFT's stated purpose was to follow the electioneering communication provisions of the Act, which it did, and OGC's Brief would render those provisions meaningless.

- TFT is not a political committee and OGC's use of the major purpose test is erroneous.

BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF	)	
	)	
TEXANS FOR TRUTH,	)	
	)	**MUR 5542**
RESPONDENT	)	
	)	

RESPONSE TO THE BRIEF OF THE GENERAL COUNSEL IN MUR 5542 ON BEHALF OF TEXANS FOR TRUTH

I. INTRODUCTION

This response is submitted on behalf of Texans for Truth ("TFT") to the brief of the Office of General Counsel ("OGC") recommending that the Commission find probable cause to believe that TFT violated various provisions of the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA"). The Office of General Counsel argues that TFT raised "contributions" in excess of $1,000 and had a major purpose to influence a federal election, and therefore was a political committee under FECA. The legal arguments set forth in the General Counsel's Brief in support of these conclusions are simply wrong. We urge the Commission to look carefully at the scant legal and factual support provided by OGC and conclude that there is no probable cause to believe that TFT received contributions or was a federal political committee.[1]

The General Counsel is asking the Commission to retroactively change the law applicable to nonfederal political organizations that were registered with the Internal Revenue Service pursuant to Section 527 of the Internal Revenue Code and were active in the 2004 election cycle. The law that was in effect in 2004 must be applied in this matter. Under that law, as the Supreme Court said in the *McConnell* decision, nonfederal 527s "remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising..." *McConnell v FEC*, 540 U.S. 93 (2003), at 187-188. Rather than requiring such 527s to become federal political committees, Congress created special prohibitions and reporting requirements for broadcast communications it denoted as "electioneering communications" regarding clearly identified federal candidates. These communications could not contain words of express advocacy, could not be financed with corporate or labor funds, and if run within 30 days of a primary or 60 days of a general election, had to be reported to the FEC. TFT fully complied with these requirements, and in fact, OGC has raised no issues with respect to TFT's electioneering communications.

OGC puts forth a very simplistic argument to support its probable cause recommendation. The first argument advanced by OGC – that TFT raised "contributions" because its email solicitations referenced federal candidates – has as its legal support a case from

[1]Importantly, unlike several other 527 respondents in different MURs, OGC does not argue that TFT made expenditures or that any of its three television advertisements contains express advocacy

1995 interpreting a disclaimer provision that is no longer in the statute and that does not say what OGC asserts that it says. *FEC v Survival Education Fund, Inc ("SEF")*, 65 F.3d 285 (2d Cir. 1995). No other legal support is offered. In fact, under *Buckley v Valeo*, 424 U.S. 1 (1976) (*per curiam*), and as confirmed in *SEF*, the only funds that are "earmarked for political purposes" are those that will be "converted to expenditures subject to regulation," that is, express advocacy expenditures. *SEF* at 297. Again, not even OGC argues that TFT made "expenditures".

Despite OGC's claim that it is applying *SEF*, what OGC is really doing is retroactively applying the new solicitation rule. This is contrary to the Commission's explicit public statement in the Explanation & Justification of section 100.57 that this regulation a new rule that applies to communications *following the effective date of the rules*, which was January 1, 2005, well after the activity that is the subject of this matter *See Explanation and Justification, Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68,057 (Nov. 23, 2004). Prior to the effective date of these regulations, it was simply not the law that the message in a solicitation determined whether the funds donated were "contributions."

Finally, because the law at the time exempted Internet activity, including emails, from the definition of public communications, and because the only solicitations cited as evidence by OGC were emails, this activity should be considered exempt, and OGC is precluded from using emails as evidence of political committee status, when such emails are exempt from coverage under the Act. This alone should be sufficient to find no probable cause.

The second argument advanced by OGC – that TFT is a political committee because its major purpose was to influence a federal election – is contrary to Supreme Court precedent, congressional action and the Commission's own action in declining to redefine "political committee." Under *Buckley*, an entity's "major purpose" is examined only after it has been determined that contributions were received or expenditures made. *Buckley,* 424 U.S. at 79. *Buckley* held that contributions were those that were given to a candidate or used to make expenditures. Expenditures are those that contain express advocacy. When Congress passed the legislation in 2000 requiring 527s that were not federal political committees to register and file reports with the IRS, it did so specifically in recognition that entities like TFT were permissible under the law and were in fact not regulated by FECA. This view was confirmed by various FEC Commissioners in public statements made during the 2004 cycle.

The Office of General Counsel never actually explains how a committee's major purpose can be examined, if the committee has not made any expenditures. In addition to their attempt to extend coverage to exempt Internet activity, OGC is apparently claiming that an ad mentioning a federal candidate with a negative or positive reference to that candidate or a discussion of that candidate's qualifications or fitness is sufficient to establish a major purpose, even if (as was the case in TFT ads) there was no mention of candidacy, elections or voting and no exhortation to the viewer to take electoral action. This analysis of major purpose eliminates the electioneering communication provision from the law and is directly contrary to the representations made by the Commission in its brief to the Supreme Court in *McConnell*, in which the Commission said to the Court that under BCRA interest groups could continue to run issue ads outside the 30 and 60 days

windows and continue to run print advertisements, send direct mail or use phone banks *"to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund"* *See* Brief of Fed. Election Comm'n, *McConnell v FEC*, 540 U.S. 93, n. 40 (2003).[2]

Even the sponsors of the legislation told the Court that the electioneering communication provisions were not overbroad because they are *"directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate"* (Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp 2d 176 (quoting *Buckley*, 424 U.S. at 80)). Contrary to these representations to the Court, the Office of General Counsel is essentially asking the Commission to write the electioneering communication provisions out of the law, since under the standard they have now concocted – a standard which is different than the Commission applied in past cases – virtually all electioneering communications would trigger political committee status.

This is not the law, and that was confirmed by the sponsors of McCain-Feingold. Regarding issue advertising, Senator McCain explained that under McCain-Feingold, groups advertising more than 60 days before a general election (30 days before a primary) will remain unregulated: "With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, *federal election law contribution limits and disclosure requirements should apply only if the ads contain 'express advocacy'*" 148 Cong. Rec. S2141 (2002).

When the erroneous legal arguments are peeled away, it is clear that the Office of General Counsel has vastly overreached in an attempt to change the rules that were applicable to 527s making electioneering communications during the 2004 election cycle. The Commission must reject the analysis in this brief and find no probable cause that TFT violated any provision of the law.

II. FACTUAL BACKGROUND.

TFT is an unincorporated association registered with the Internal Revenue Service pursuant to section 527 of the Internal Revenue Code as a political organization. TFT was set up as a 527 expressly to engage in lawful activity that falls short of making it a federal political committee.[3] The IRS defines a 527 political organization as an association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting donations or making disbursements, or both, for the exempt function purpose of influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state, or local public office or office in a political organization. *See* 26 U.S.C. § 527. Since its inception, TFT has filed timely disclosure reports of receipts and disbursements with the IRS. Furthermore, TFT accurately followed the statutory guidelines applicable to electioneering communications by filing timely reports for all such

[2] During the 30 and 60 day pre-election periods ads may still be run with individual money

[3] *See* Smith Dep 24, Dec 8, 2005, "I figured out that the rules required me to file as a 527 organization, and I set out to do that"

communications. TFT also did not use any corporate or labor union funds for these communications.

On Form 8871, TFT states its purpose is "to educate voters on the records and views of candidates for public office and to promote interest in political issues and participation in elections." Or, as Glenn Smith, TFT's founder, repeatedly stated in his deposition by OGC to raise public awareness. (Smith Dep. 78-9, 81-2, Dec. 8, 2005.) As a 527, TFT lawfully engaged in issue advocacy relating to the 2004 election cycle. TFT's three communications centered on raising public awareness of George W. Bush's service record. As recognized in OGC's brief, none of TFT's three television ads expressly advocated the election or defeat of a clearly identified candidate.[4] All three of these advertisements were electioneering communications; all three electioneering communications were developed and distributed with individual funds and properly reported to the Commission.

TFT sent out a handful of email solicitations in support of its activities, at nominal cost to TFT. TFT did not solicit money via direct mailings or any other general public advertising. OGC bases its entire case on TFT's emails. However, these emails were not considered public communications under the Act at that time and were exempt as internet activity, and as such cannot be used as public statements of purpose. OGC fails to address this question at all. Recently, the Commission has clarified its rules as to Internet activity, and to determine that TFT violated the law based on nothing more than a few emails – when OGC raises no issues as to the electioneering communications themselves – is clearly contrary to the law, arbitrary and capricious, and unfair and inequitable to TFT.

III. TFT WAS NOT REQUIRED TO REGISTER AND REPORT AS A FEDERAL POLITICAL COMMITTEE.

A. TFT Did Not Receive "Contributions" As Defined Under the Act, and None of TFT's Solicitations or Any Other Activities Caused the Non-Federal Funds Raised To Be Converted Into Federal Contributions.

The Office of General Counsel first argues – with insufficient legal and factual support – that the funds received by TFT during 2004 constituted contributions, as defined by the Act, and therefore required TFT to register as a political committee because it received contributions in excess of $1,000. This argument is deeply flawed and appears to be a transparent attempt to retroactively apply new Commission regulation 100 57 to activity which occurred – in its entirety – prior to the effective date of that new provision. Nothing in the Act or Commission regulations at the time of the fundraising in question made it a violation of the Act to solicit and accept funds in the manner in which TFT did, and nothing in the Act or Commission regulations operated to "convert" those funds from nonfederal donations into federally regulated contributions. Similarly, no case law – OGC's erroneous reliance on one singular and inapposite court case notwithstanding – and no opinion or precedent of the Commission operated to convert

[4] TFT fully complied with the electioneering communication provisions by using only funds donated by individuals However, these individual donors, whose funds were used to make the electioneering communications, could themselves have made unlimited independent expenditures that contained express advocacy

funds legally raised as nonfederal donations into federal contributions. In fact, prior to the passage of BCRA, the Commission historically recognized the legality of the very type of non-federal fundraising at issue here.

1. **OGC's Brief is nothing more than a thinly veiled and legally impermissible retroactive application of 100.57, contrary to the Commission's express direction to the regulated community.**

The OGC Brief states that ". . . *all funds* received in response to these solicitations, which were deposited into TFT's account and used to pay for TFT's advertisement campaign, constituted contributions received by TFT." *See* OGC Probable Cause Brief at 9 (emphasis added). This conclusion is apparently based on OGC's assertion that three TFT email fundraising solicitations "clearly indicated that the funds received would be targeted to the defeat of a specific federal candidate." *See* OGC Probable Cause Brief at 7.[5] However, assuming, *arguendo*, that this statement is factually correct, no provision of the Act or the Commission's regulations in effect during 2004 trigger political committee status for TFT on the basis of its solicitations. Only under the recent addition to the definition of "contribution" at 11 C.F.R. §100.57, and its retroactive application, could this statement come close to being accurate.[6]

The application of section 100.57 to TFT's 2004 activities would be directly contrary to the Commission's own express statements and directions to the regulated community. The Commission has been clear: section 100.57 is a "new rule" that explains when funds received in response to certain communications must be treated as contributions. *See Explanation and Justification, Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056 (Nov. 23, 2004). ("*E & J*") Throughout the *E & J*, there are repeated references to the fact that this particular section of the regulations is new.[7] This so-called new rule was published in the Federal Register on November 23, 2004 and became effective on January 1, 2005, after the dates of the activity at issue in this MUR.

Importantly, the Commission expressly states that a communication must occur following the effective date of the new rule, in order for amounts received in response thereto to be considered contributions. *See id* at 68057. This alone is dispositive of the issue: all of

[5] OGC relies solely on four email solicitations As more fully explained later, two of those were actually the same email sent out over two consecutive days

[6] There is also a legitimate legal question as to whether these solicitations – being in email form – would have been covered by any Commission rule or regulation or would have been exempt at that time as internet activity The Commission has only recently – and subsequent to the activity here – clarified its application of the law to internet activity TFT sent no direct mail or other traditional solicitations

[7] By expressly calling this a new rule, the Commission implies that such a rule did not previously exist, otherwise, it would not be new If OGC's position is – however inexplicable – that this "new" rule codified a previously existing precedent, then OGC has the burden of providing that precedent Instead, its Brief is completely silent on the subject, leading to the only reasonable conclusion· there is no such precedent, and "new" means "new " OGC cannot claim that section 100 57 "codified existing law" and at the same time disclose that it is "new" – such a result is totally unfair to the regulated community

TFT's receipts occurred prior to the effective date (Jan. 1, 2005), and, therefore, are not contributions.

Finally, the Commission has also been clear as to the need for and reasoning behind this new rule: "[t]he draft final rules are intended to give clear guidance to persons engaged in political activity so that they will know with a high degree of certainty whether their activities are subject to Commission regulation." *See* Memorandum to the Federal Election Commission for the Meeting of August 19, 2004, "Draft Final Rules for Political Committee Status" (Agenda Document No. 04-75) at 2 If there had been clear guidance prior to the promulgation of this new rule, there would have been neither a need for the rule, nor for the Commission to justify the rule by desiring to give clear guidance.

Accordingly, there is simply no legal avenue whereby the Commission may apply section 100.57 – or the theory behind it – to the content of TFT's email solicitations. To do so is contrary to the Commission's stated intent, as clearly expressed in the *E & J*. *See E & J* at 68057. Section 100.57 did not exist at the time of the solicitations, and cannot be used to find a retroactive violation of the Act.[8] TFT complied with the law as it existed at that time.

2. The Office of General Counsel relies exclusively on one court case, *FEC v. Survival Education Fund, Inc.*, and its reliance on that case is deeply flawed.

Apart from the disguised application of 100.57, the sole stated legal precedent in support of its allegation that TFT raised "contributions" is a 1995 case from the Second Circuit interpreting the disclaimer requirements of Section 441a(d), as they were in 1995. *See FEC v Survival Education Fund, Inc* , 65 F.3d 285 (2d Cir. 1995).[9] This case does not stand for the precedent argued by OGC, is not the law in this Circuit and, indeed, reviewed a section of the Act that no longer even exists.

First, this 1995 Second Circuit case interpreted only the disclaimer requirements then in effect. Since the time of that opinion, the disclaimer regulations have been changed and no longer even contain the language that the court was interpreting in *SEF*.[10] That alone makes this case inapposite, and at best, OGC's Brief is citing dicta taken out of context.[11]

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[8] *Bowen v Georgetown Univ Hospital*, 488 U S 204, 208 (1988) ("A statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms")

[9] As explained below, in addition to the fact that OGC cites no provision of the Act or Commission regulations to support its erroneous assertion, there is neither a single Advisory Opinion nor enforcement matter cited

[10] Factually, the opinion analyzes only one direct mail communication. The court notes that the old disclaimer requirement it is interpreting only applies to communications by broadcast, newspaper, magazine, outdoor advertisement or general public political advertising, none of which were used by TFT to solicit funds *See SEF* at 38 All of the solicitations cited by OGC in its brief were in person, by phone or email None were through any form of general public communication and would not even have been subject to the disclaimer rule in effect at the time of the *SEF* opinion

[11] The fact that OGC relies on one sentence from one ten-year-old court case as its entire legal position is insufficient, as a matter of law, for the Commission to move forward to probable case

Second, OGC argues that this case stands for the proposition that funds raised may be "contributions" even if they are not used to make "contributions" or "expenditures," as defined and understood through a long series of court cases and legislative history. This is a gross misrepresentation of the court's opinion in *SEF*. In fact, the court said:

> We think the hazards of uncertainty feared by defendants can be avoided. The only contributions "earmarked for political purposes" with which the Buckley Court appears to have been concerned are ***those that will be converted to expenditures*** subject to regulation under FECA. (emphasis added)

See SEF at 27. This opinion, in fact, supports the reading of *Buckley* more fully discussed in Section 3 below, that funds donated are "contributions" only if they are used by the recipient to make "contributions" to candidates or to make "expenditures." **Nowhere in OGC's Brief is any mention, assertion, allegation, or conclusion that TFT made expenditures (or used the funds raised to make expenditures). Accordingly, the only case (and sole legal support) relied on by OGC fails to support OGC's proposition, and instead supports TFT's: that in the absence of expenditures, the funds raised cannot be considered contributions under the Act.**

Importantly, the court in *SEF* affirms a very narrow construction of "political committee" under *Buckley*, contrary to OGC's overly broad swath, and explicitly recognizes that issue advocacy groups may both applaud and criticize federal candidates and raise funds – that are not contributions – to do so, even in an election year. *See id.* at 295. Thus, again, if anything, *SEF* stands for the very proposition that TFT – not OGC – is contending: that not all fundraising activity that mentions federal candidates converts the funds raised into federal contributions. *SEF* has, in fact, never been cited by another court as supportive of OGC's proposition, but rather has been cited as supportive of TFT's position, requiring a narrow reading of *Buckley*. *See, e g , Right to Life v FEC*, 6 F.Supp 2d 248, 250 (S.D.N.Y. 1998); *Vermont Right to Life v Sorrell*, 19 F.Supp 2d 204, 213 (D.Vt. 1998).

Indeed, this TFT matter is more akin to *FEC v GOPAC*, 917 F.Supp. 851 (D.D.C. 1996), rather than *SEF* In *GOPAC*, the Commission attempted to radically expand the Act's scope and coverage through the analysis of GOPAC's direct mail fundraising solicitations, but the District Court soundly rejected the Commission's position and endorsed the narrower *Buckley* standard. *See GOPAC* at 855, 859 (GOPAC direct mail fundraising efforts were insufficient, alone, to conclude that GOPAC should register as a federal political committee; thus rejecting the Commission's "broader – and troubling – interpretation of the Act").

Finally, since this decision was rendered, Congress has passed two very specific laws regarding reporting requirements for 527 organizations and the BCRA electioneering communication provisions, and the Commission declined to change its regulations regarding political committees. It is the 527 law and the electioneering communication provisions that are applicable to TFT as outlined more fully below. OGC's attempt to resurrect a ten year old opinion from a different Circuit, interpret a different provision of the law that has been repealed, and argue that it supports an interpretation of the law that is totally inconsistent with applicable

recent court decisions and recent legislative activity is a complete distortion of the applicable law.

Under the logic (or lack thereof) of the OGC position, an organization could make "electioneering communications" against or in support of a clearly identified candidate, but, if its solicitation told perspective donors that the funds would be used to make those very electioneering communications against or in support of that clearly identified candidate, it would become a federal political committee. Accordingly, OGC's argument that donations made to TFT were contributions (based on the *SEF* opinion) – thus turning TFT into a political committee – must be rejected.

3. Prior to the enactment of 100.57, the content of a solicitation did not determine whether money raised was subject to federal rules or was "converted" to contributions.

As indicated above, Commission regulation 100.57 is a new rule enacted subsequent to the TFT solicitations at issue here. OGC's Brief cites no provision of the Act or Commission regulations that would have restricted the content of a nonfederal entity's solicitation. OGC points to neither a single Advisory Opinion nor enforcement matter to stand for this proposition. It is simply erroneous to claim that this was the law prior to January 1, 2005.[12]

The settled law during 2004, even as recognized by the Commission, was *Buckley*. Under *Buckley,* donations are only contributions if they are made in order for the recipient to further make express advocacy expenditures or contributions to candidates. In *Buckley*, the Court construed "contributions" as only those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80. Nothing in *Buckley* stands for the proposition asserted by OGC: that the content of solicitations is determinative of whether federal or nonfederal money is being raised. Nothing in *Buckley* stands for the proposition that funds are automatically converted to "contributions" based on the wording of a solicitation.

Most importantly, nothing in *SEF* changed the *Buckley* decision, regardless of OGC's partial and piecemeal use of that case and the taking of quotations out of context. In fact, as explained in the previous section, the *SEF* court was careful to indicate that it was following the *Buckley* limitations: "[t]he only contributions "earmarked for political purposes" with which the Buckley Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA." *See SEF* at 27.

Before the BCRA ban on political party soft money, the FEC followed *Buckley* and did not take the position that money is hard money because of the content of the solicitation. Federal candidates frequently in the past raised soft money, and the donations received were not

[12] Even *SEF*, the ten-year-old court case cited by OGC, indicates that solicitations that applaud or criticize federal candidates do not convert the money raised into federal contributions *See SEF* at 295

considered federal contributions.[13] The Commission is well aware that candidates – from both parties – were explicit that the soft money contributions that they raised were of assistance to their own campaigns. Yet, as indicated, OGC cites not one instance prior to the passage of BCRA where the Commission found that soft money proceeds received in response to a candidate solicitation were converted to hard money. In fact, the definitive statement on this issue was made in 1997 by then Attorney General Janet Reno in reviewing soft money donations raised by Vice President Al Gore. In deciding against appointing an independent counsel to investigate possible violations of 18 U.S.C. § 607, Attorney General Reno stated that section 607, "specifically applies only to *contributions* as technically defined by the Federal Election Campaign Act (FECA) – funds commonly referred to as 'hard money." *See S Comm. on Gov't Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Fed Election Campaigns*, S. Rep. No. 105-167, Vol. 1, at 503 (1998). This decision was made on the grounds that Vice President Gore was soliciting funds for the Democratic National Committee's nonfederal account, or funds considered "soft money."

Clearly, if the Commission had truly believed that the law was different at the time, there would be numerous MURs involving the solicitation of soft money by candidates. Accordingly, and as indicated earlier, there is simply no Commission rule or precedent that existed during the time in question that would convert money raised into federal contributions based on the content of the solicitations. Under the controlling ruling of *Buckley*, TFT's email solicitations were legal and raised exclusively nonfederal funds.

4. None of TFT's email solicitations contained express advocacy, and even under OGC's reading of *Survival Education Fund*, TFT's solicitations would not have raised contributions.

OGC's entire case is based on language in three (3) email solicitations.[14] OGC's issue with the solicitations is apparently that the phrase "swing states" is referenced once and that they are critical of George W. Bush. Neither of these observations is sufficient, either alone, or collectively, to convert the funds raised from the solicitations into hard money contributions and provides only the barest skeleton of a case to find probable cause. OGC states that "[t]hese solicitations inform potential donors that the funds contributed would be used to advocate President Bush's defeat at the polls . . ." (OGC Brief at 9.) This statement is false. None of the solicitations contain express advocacy for the defeat of President Bush.

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[13] In one of the most well documented examples of this, during a March 3, 1997 press conference held by Vice President Al Gore, it was clear that he made several telephone solicitations for the Democratic National Committee ("DNC") from the White House in which he stated he asked donors, "to help raise *campaign funds*," "to ask people to make lawful contributions *to the campaign*," "to support *our campaign*," "to help[] to raise funds *for the campaign*," and "to help raise money *for the campaign*" *Emphasis added S Comm on Gov't Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Fed Election Campaigns*, S Rep No 105-167, Vol 1, at 502 (1998) The Commission reviewed this activity in the audit of the Clinton/Gore '96 campaign and in a subsequent MUR, and never suggested that the soft money donations to the DNC made as a result of these and similar solicitations were hard money contributions to the DNC

[14] OGC cites to four emails, but two of them have the identical content and were simply sent to different persons on two consecutive days

a. September 7, 2004 email solicitation.

This is the first solicitation cited by OGC. OGC cites this email for one use of the phrase "key swing states" in explaining where the ads critical of George W. Bush would appear. In this solicitation, there is no reference to an election, to candidacy or to voting. There is no exhortation to the reader to take any electoral action. This email simply solicits non-federal funds with which to run electioneering communications. Without citation to any legal authority in support, other than *SEF*, or comparison to any other matter, the OGC brief simply asserts that because this email discusses where ads are planned, it can have no meaning other than to discourage the election of George W. Bush.[15]

Glenn Smith, TFT Founder, fully explained the use of the phrase "swing states" in his deposition:

> "I know we wanted to communicate with people we thought would be paying attention and in those places that had lost large numbers of servicemen in Iraq, we figured they would be paying attention . . . I didn't have any illusions with this tiny bit of money and shoe-string type of operation that I was going to turn the world off to George W. Bush anywhere . . ."

(Smith Dep. 77-8.)

The solicitation does not give the viewer any direction as to how to vote. It is simply asking them to contribute money to raise public awareness of the issue of George W. Bush's military service. All available public information indicated that the war in Iraq was the primary issue in the country, and this relates directly to that issue. What, if anything, to do about that issue is not discussed, and is presumably left to the later viewer of the ad to determine. The use of the phrase "swing states" is insufficient factually and as a matter of law to conclude that this email solicitation triggered the receipt of federal contributions.

b. October 8/9, 2004 email solicitation.

This is essentially one solicitation, as far as content, that was sent out over two days. OGC cites this email for using the phrase "American voters" and informing them of ads that would "criticize" President Bush. In this solicitation, there is no reference to an election, to candidacy or to the act of voting. There is no exhortation to the reader to take any electoral action. This email simply solicits non-federal funds with which to run electioneering communications. Without citation to any legal authority in support, Commission regulation, or comparison to any other matter, the OGC brief simply asserts that because this email discusses critical ads that are planned, it can have no meaning other than to discourage the election of George W. Bush.

However, even *SEF* stands for the proposition that ads criticizing a candidate or commenting on his or her character or fitness for office can be run without a contribution or

[15] OGC's Brief does not cite to the Commission's express advocacy standard at 11 C F R § 100 22 or any court case, but simply makes this assertion

expenditure occurring. *See SEF* at 295 (Issue groups "may take positions favorable or unfavorable to different candidates, and may solicit contributions to promulgate their views to the public, even for the purpose of applauding or criticizing candidates during an election campaign".) Clearly, too, there is no prohibition in the electioneering communication provisions on ads that criticize or comment on character or fitness for office.

The solicitation does not give the viewer any direction as to how to vote. It is simply asking them to contribute money to raise public awareness of the issue of George W. Bush's military service. All available public information indicated that the war in Iraq was the primary issue in the country, and this relates directly to that issue. What, if anything, to do about that issue is not discussed, and is presumably left to the later viewer of the ad to determine. The use of the phrase "American Voters" is insufficient factually and as a matter of law to conclude that this email solicitation triggered the receipt of federal contributions.

c. October 11, 2004 email solicitation.

The last email cited by OGC is similar to those discussed above, and is cited for use of the same phrases and proposed ads criticizing George W. Bush. There are no other "offending" phrases cited by OGC. In this solicitation, there is no reference to an election, to candidacy or to the act of voting. There is no exhortation to the reader to take any electoral action. This email simply solicits non-federal funds with which to run electioneering communications. For the same reasons that pertain to those emails, OGC's legal analysis is flawed.

The solicitation does not give the viewer any direction as to how to vote. It is simply asking them to contribute money to raise public awareness of the issue of George W. Bush's military service. All available public information indicated that the war in Iraq was the primary issue in the country, and this relates directly to that issue. What, if anything, to do about that issue is not discussed, and is presumably left to the later viewer of the ad to determine. The use of the phrases "swing states" and "American Voters" is insufficient factually and as a matter of law to conclude that this email solicitation triggered the receipt of federal contributions.

5 OGC is using exempt internet activity to convert TFT into a political committee – a result that has no legal support, is arbitrary and capricious, and is simply wrong.

Finally, even if the Commission were to reject all of the preceding arguments, it still should decline to take any action with respect to TFT on the basis that OGC relies solely on three solicitations sent via email for its conclusions. At the time of this activity, email solicitations were considered exempt from the Act's coverage. These emails were not even subject to disclaimer requirements. At best, there was a lack of clarity and general murkiness in the regulated community over the Commission's treatment of internet activities, which the Commission sought to clarify only recently, in 2006 – when it ratified the previously existing exemption.

TFT did not solicit any funds through direct mail or other general public political communications, as defined in Commission regulation at 11 C.F.R. section 100 26. Even there,

it states conclusively that Internet activities shall not be considered public communications.[16] The Commission itself stated:

> When the Commission promulgated regulations to implement these BCRA provisions, it explicitly excluded all Internet communications from its definition of "public communication" and, therefore, none of the Commission's rules governing the funding of "public communications" applied to Internet communications. *See 11 C F R § 100 26, Final Rules on Prohibited and Excessive Contributions, Non-Federal Funds or Soft Money, 67 Fed Reg 49064 (July 29, 2002), See also Final Rules on The Internet Definition of Public Communication, 71 Fed Reg 18589, 18591 (April 12, 2006)*

Thus, incredibly, OGC is relying only on exempt activity to construct a violation here. TFT's email solicitations each cost approximately $65.00 per email to prepare and distribute, certainly nominal cost by any fair test. As explained below, OGC does not assert that TFT made any "expenditures" under the Act. The General Counsel is using emails – which the Commission would otherwise and in other contexts consider insufficient to establish any violation due to the Internet exemption – to create a nonsensical theory whereby activity that was carefully planned to comply with the electioneering communication provisions is somehow illegal.

On the basis of sending three emails alone, OGC would have all of the Act's provisions triggered with respect to TFT – disregarding the electioneering communication provisions – and require TFT to become a federal political committee. Such a result is without legal support, arbitrary and capricious, unfair, unwarranted, and simply wrong. The Commission should decline to find probable cause on this basis.

6. Conclusion

Accordingly, there is no legal support for the proposition advanced by OGC: that the content of solicitations made, in their entirety prior to the effective date of section 100.57, can convert nonfederal funds into federal contributions and can determine whether a nonfederal entity must register with the Commission as a political committee. In fact, just the contrary was clear under the law in effect in 2004, including the statute, regulations, opinions, enforcement matters, and relevant court cases. The language of an email solicitation was irrelevant to – and likely exempt from – the registration and reporting requirements of the Act. As a result, none of TFT's solicitations or funds received triggered registration with the Commission as a federal political committee, and the Commission should decline to find probable against TFT on this basis.

[16] Under new regulation 100 94, the Commission clarified that emails are considered "internet activity" Se 11 C F R section 100 94(b)

B. TFT is Not a Political Committee and OGC's Use of the Major Purpose Test is Erroneous.

TFT is a political organization registered with the Internal Revenue Service under §527. It is not a political committee required to register with the FEC.

Contrary to existing law and precedent, OGC attempts to apply its "major purpose" test to TFT to show that it is political committee. To demonstrate major purpose in this matter, OGC claims to rely on "public statements" of purpose, OGC Brief at 10, and those public statements here consist of TFT's exempt email solicitations, as well as "sufficient spending on campaign activity," i.e., its three advertisements "critical" of George W. Bush. *See* OGC Brief at 11. OGC's statements are neither factually correct in this case nor do they apply the legally applicable standard.

TFT's exempt email solicitations are fully discussed above, as to why they cannot be used to trigger the Act's requirements. In addition, as also indicated above, nowhere does OGC claim that TFT's advertisements contain express advocacy or even cite to 11 C.F.R. § 100.22 as a basis for its conclusions, because, under any fair review, the ads do not contain express advocacy. Similarly, no where does OGC claim that TFT made any expenditures, again, simply because, it did not.[17]

On the other hand, OGC repeatedly asserts that TFT's ads were critical of George W. Bush. Thus, by its own admission, OGC recognizes that the ads were critical, but did not rise to the level of "express advocacy" or "expenditures" – the very type of speech that, but for the electioneering communication provisions with which TFT complied, is unregulated under current law. Even the sole court case cited by OGC in support of its position, recognizes the ability of groups to air ads criticizing federal candidates and stands for the proposition that ads criticizing a candidate or commenting on his or her character or fitness for office can be run without a contribution or expenditure occurring. See *SEF* at 295 (Issue groups "may take positions favorable or unfavorable to different candidates, and *may solicit contributions* to promulgate their views to the public, even for the purpose of applauding or criticizing candidates during an election campaign" (emphasis added).

This decision came down well before BCRA's "electioneering communications" category was enacted. If Congress had intended to enact the law that OGC says is found in *SEF*, it could have done so. But it did not. Instead, Congress identified this category of communications that mention a federal candidate, with praise or criticism falling short of express advocacy, and chose to regulate them as "electioneering communications."

No other TFT public statements are relied on by OGC. Inexplicably, OGC cites to statements made about TFT by another 527, the Swift Boat Veterans for Truth, as justification for TFT's status as a political committee. *See* OGC Brief at 13. OGC's attempts to use an unrelated organization's description of TFT's activities cannot be seriously relied on to

[17] Thus, this matter can be distinguished from other MURs, where OGC both relied on §100 22 as the legal basis for its findings and concluded that expenditures under the Act were made

demonstrate that TFT is a political committee. Under such a standard, the Commission would be forced to consider any mere accusation or comment as determinative of political committee status.[18]

Similarly, OGC's reliance on the fact that TFT was a small organization and was unable to raise the type of resources that permitted it to engage in broader political activity is irrelevant to its status as legitimate non-federal committee. (OGC Brief at 11.) The IRS 527 provisions explicitly permit such an organization to engage in federal activity.[19] OGC is nonsensically suggesting that if TFT spent millions of dollars on non-federal candidates, but still engaged in the activity at issue here, it would not have to register as a federal committee. That certainly is not the law to date, and OGC cites no Commission rule or regulation in support of that interpretation. If anything, such an argument is an implicit recognition by OGC of the weakness of their factual and legal case. If the activities undertaken by TFT would not have established a violation in the presence of other spending, then they also would not in the absence of such spending.[20]

The actual statutory test for whether an entity is a Federal "political committee" is whether it receives "contributions" or makes "expenditures" as those terms are defined in FECA. In *Buckley v Valeo,* 424 U.S. 1 (1976), the Supreme Court narrowly construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. Similarly, the Court construed "contributions" as those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

These terms were not redefined by Congress in the Bipartisan Campaign Reform Act of 2002 (BCRA) and the Supreme Court did not reinterpret them in *McConnell v FEC,* 124 540 U.S. 93 (2003). Congress enacted BCRA to carefully draw a second bright line for non-party, non-candidate organizations – targeted broadcast ads that run within 30 days of a primary election or 60 days of a primary election that refer to a clearly identified candidate for federal office may not be paid for by or with funds from a national bank, corporation, or labor organization. 2 U S.C. §§434(f)(3); 441b(b)(2). Congress further required that the names and addresses of contributors who contributed $1,000 or more to the account used to pay for electioneering communications are disclosed within 24 hours. 2 U.S.C. § 434(f). In *McConnell,* the Supreme Court held that this new bright line was constitutional, even if the ads did not

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[18] The fact that Swift Boat Veterans for Truth entered conciliation and may have admitted wrongdoing has no bearing whatsoever on TFT's status, particularly when Swift Boat Veterans for Truth spent some $20 million compared to TFT's $500,000

[19] The IRS defines a 527 political organization as an association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting donations or making disbursements, or both, for the exempt function purpose of influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state, or local public office or office in a political organization *See* 26 U S C § 527

[20] Such a test would also lead to inequitable results whereby smaller organizations would receive more severe punishment than well-financed organizations that could afford to "cover" their activities with other spending

contain express advocacy, because the electioneering communication "components are both easily understood and objectively determinable." *McConnell* at 634. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy" does not apply to electioneering communications. *McConnell* at 689. BCRA did not amend FECA to require organizations that run electioneering communications to register as political committees nor did the *McConnell* Court impose such a requirement

Like its attempt to apply the inapplicable provision of section 100.57 to TFT's solicitations, the OGC Brief appears to be an attempt to apply another inapplicable legal standard – PSAO – to TFT's disbursements. OGC admits that TFT's ads did not contain express advocacy and omits any reference to 100.22, but persists in referencing the ads' criticism of George W. Bush, leaving TFT to guess that they are implicitly applying the "promote, support, attack or oppose" standard ("PSAO") when analyzing TFT advertisements. This theory – PSAO or otherwise – appears in no statutory provision or regulation applicable to TFT and is a different standard than the FEC has ever applied to communications.[21] Perhaps OGC is attempting to apply it without naming it, because at least one Commissioner has indicated that the PSAO standard applies only to political party committees and, in a more limited sense, candidates[22] and that there is no consensus view on the Commission as to the specific definition of PSAO.[23]

Importantly, none of the three ads contains a reference to elections, campaigns, candidacy, voting, or any other exhortation, request or suggestion that the viewer of the ad take any action. All three ads are about military service and relate to the war in Iraq – two explicitly mention Iraq – which, at the time, and even today, is, according to all available public information the top issue on the minds of the public. It is only logical that TFT and others would want to be part of this debate, consistent with the rules As Glenn Smith, Founder of TFT, stated in his deposition, the ads were intended to raise public awareness. (Smith Dep. 78-9, 81-2.) The manner of raising public awareness on the war was to contrast the conduct of the war with George W. Bush's own military service. This is precisely the type of speech – critical or otherwise – that the courts, Congress and even the Commission have long recognized as exempt from the Act's coverage (other than the electioneering communication provisions).

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[21] Somewhat troubling, however, is the fact that TFT has had to guess as to OGC's legal theory None of this discussion appears in the Brief in this matter Neither a specific Commission regulation or PSAO itself appears Instead, conclusory statements are substituted for legal citations The Commission is required to give the regulated community, in general, and this Respondent, in particular, something more than a guessing game as to what provision of the regulations applies

[22] "The Supreme Court has ruled that the term makes sense to political party committees and the Commission has used it in crafting an exemption to another provision of the law allowing candidate endorsements, but that provision by its terms applies to candidates " Ellen L Weintraub, Comm'r, Fed Election Comm'n, Remarks during FEC Open Meeting (Aug 29, 2006) (as transcribed)

[23] "Its not clear to me sitting here today that there's a consensus view on the Commission as to the precise meaning of the term 'promote, support, attack or oppose' and if there is such a consensus its not clear to me we've made it clear to the public " Ellen L Weintraub, Comm'r, Fed Election Comm'n, Remarks during FEC Open Meeting (Aug 29, 2006) (as transcribed)

Under FECA, 527 organizations such as TFT, operating independently of any Federal candidate or political party that do not make contributions to Federal candidates and do not use any funds for communications that expressly advocate the election or defeat of a clearly identified Federal candidate are not Federal political committees.[24] This has been the law for thirty years and it remains so today. There is no basis for the FEC to change these rules in its enforcement process. The Commission should reject OGC's legal position and find no probable cause to believe. The major purpose test is inapplicable here, and further support for that conclusion may be found both in congressional and court actions.

Recent Congressional action and the *McConnell* decision illustrate that there has not been fundamental change in the definition of "political committee" in FECA.

1. Congress did not change the definition of political committee.

Congress has not changed the fundamental legal definitions of "expenditure" and "political committee" since the inception of FECA and the Supreme Court's review of its constitutionality in *Buckley* The basic definitions provided by Congress in the 1974 FECA amendments have remained unchanged in the statute for thirty years covering seven presidential elections. A review of the history of amendments to FECA confirms this.

a. 1997 – 1999 history of legislative proposals.

In 1997, Senators McCain and Feingold first introduced legislation to block the use of corporate and union general treasury funds for "unregulated electioneering disguised as 'issue ads.' *See* 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997). (Brief for Defendants at 50, *McConnell v FEC*, 251 F.Supp 2d 176 (D.D.C. 2003).) This early version of the McCain-Feingold bill "addressed electioneering issue advocacy by redefining 'expenditures' subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office." *See* 143 Cong. Rec. S10107, 10108. (Brief for Defendants at 50, *McConnell*, 251 F.Supp 2d 176.)

BCRA's sponsors abandoned their effort to redefine "expenditure" and instead proposed the "narrow[er]" regulation of "electioneering communications," "in contrast to the earlier provisions of the ... bill." (Brief for Defendants at 50, *McConnell*, 251 F.Supp 2d 176 *quoting* 144 Cong. Rec. H3801, H3802 (June 28, 2001).) The Commission explained in its brief to the District Court:

> In part to respond to concerns raised by the bill's opponents about its constitutionality, Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between genuine issue advocacy and a narrowly defined category of television and radio

[24] Contrary to complainants' claims and regardless of the express or implied purpose of an organization, registration is not automatically triggered Only after the contribution or express advocacy thresholds are met is registration triggered Further, participation in joint fundraising, as more fully explained later, does not alter this conclusion

advertisements, broadcast in proximity to federal elections, 'that constitute the most blatant form of [unregulated] electioneering.' 144 Cong. Rec. S906, S912 (Feb. 12, 1998). Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with 'clear and narrowing wording' which, in contrast to the earlier provisions of the McCain-Feingold bill, supra, strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in *Buckley*. Snowe-Jeffords was adopted as an amendment to both the Shays-Meehan and McCain-Feingold bill, 144 Cong. Rec. H3801, H3802 (June 28, 2001).

(Brief for Defendants at 50, *McConnell v FEC*, 251 F.Supp 2d 176.) As the sponsors explained, "Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purpose, so as to leave unregulated as many avenues of speech as possible." (Opposition Brief for Defendants at I-84, *McConnell v FEC,* 251 F.Supp 2d 176 (D.D.C. 2003).)

b. 2000 legislation regarding 527 political organizations.

In 2000, Congress considered the growing number of political organizations that were not subject to the reporting requirements of FECA and passed legislation addressing 527s that are not Federal political committees. This law requires them to register with the IRS and file disclosure reports with the IRS listing their donors and disbursements -- precisely because they are not required to register at the FEC or report to the FEC. H.R. 4762, 106th Cong. (2000) (enacted).

The 527 disclosure law did not change the definition of "expenditure" or require these organizations to register as political committees with the FEC even though at the time this legislation was debated and enacted it was understood by Congress that 527 organizations that were engaging in non-express advocacy communications impacting Federal elections and were spending millions of dollars to do so. In his testimony before the House Ways and Means Committee on June 20, 2000, Senator McCain identified the lack-of disclosure as the problem that Congress needed to narrowly address. Quoting from a newspaper article Senator McCain stated that special interests "can donate unlimited sums to entities known as 'section 527 committees,' beyond the reach of the campaign-reporting laws designed to curb such abuses." *Disclosure of Political Activities of Tax Exempt Organizations: Hearing on H R 4717 Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 106th Cong. (June 20, 2000) (statement of Sen. John McCain).

The Committee and Dissenting Views presented in the House Report shared the same reasons for changing the law to only require disclosure. Neither suggested that the solution to the problem was for 501(c) or 527 organizations engaged in the exempt purpose of "influencing or attempting to influence" a federal election to register as a political committee with the FEC or file disclosure reports with the FEC. The Committee was clear about its goal: "[T]he bill does

not regulate political activities, but instead merely requires the disclosure of such activities..." H.R. Rep. No. 106-702, at 15 (2000).

Pro-reform Members argued for an even narrower disclosure bill than H.R. 4717 that did not cover 501(c) organizations -- one that was more likely to pass in 2000. H.R. 4672 was a solution adopted by the House and Senate and approved by the President that only required 527 organizations to register and file periodic disclosure reports with the IRS – not the FEC. In the summer of 2000, Congress did not limit in any way a 527's ability to continue to legally engage in non-express advocacy communications for the exempt function of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office." Congress did not require any additional 527s to register as political committees with the FEC and it did not change the FECA definition of political committee when it passed this legislation.

c. 2002 BCRA history.

In 2002, BCRA was passed to address two primary issues of concern related to soft money. First, it prohibits federal candidates and national party committees from raising and spending non-federal funds. Second, it prohibits the use of corporate and labor funds to pay for electioneering communications during a limited period of time shortly before a Federal primary or general election. In BCRA, rather than amend the general definition of "expenditure," Congress tacked the new term "electioneering communications" to FECA's prohibition on corporate and labor union contributions. 2 U.S.C. § 441b(b)(2). The FEC explained to the Supreme Court that BCRA was "a refinement of pre-existing campaign-finance rules" rather than a "repudiation of the prior legal regime" because BCRA merely extended the reach of Federal election law from express advocacy to "electioneering communications" paid for with corporate or labor union general treasury funds within a short time period before Federal elections. (Brief for Appellees at 27, *McConnell v FEC*, 124 S. Ct. 619 (2003))

BCRA's Congressional sponsors supported the limited purpose of BCRA in their arguments to the Supreme Court in *McConnell*, contending that "[Congress] made another 'cautious advance' in the long history of 'careful legislative adjustment of the federal electoral laws' to reflect ongoing experience ... It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not 'unnecessarily circumscribe protected expression.'" (Brief for Defendants at 43, *McConnell v FEC*, 540 U.S. 93 (2003).) They argued that the express advocacy meaning developed over the years by the Court provided a guide for Congress into which they said the electioneering communication restriction was narrowly applied: "It was, after all, principally a concern for clarity that first led this Court to adopt the 'express advocacy' test as a gloss on FECA's language." (Brief for Intervenor-Defendants at 59, *McConnell v. FEC,* 251 F.Supp 2d 176 (D.D.C. 2003) (Civ. No. 02-582) (citing *Buckley*, 424 U.S. at 40-44, 79-80).)

The Congressional sponsors explained that BCRA was crafted by using the express advocacy analysis developed by the Court as a roadmap with two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions were not overbroad since they were "directed precisely to that spending that is unambiguously related to the campaign of a particular

federal candidate.'" (Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp 2d 176, (quoting *Buckley*, 424 U.S. at 80).) "Those are precisely the precepts to which Congress adhered to in framing (the electioneering communication provisions)." (Brief for Intervenor-Defendants at 62, *McConnell*, 251 F.Supp 2d 176.)

In its argument to the Court, the FEC, too, was explicit that BCRA left unregulated all public communications other than express advocacy and "electioneering communications." "[B]ecause of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly interested in airing electioneering communications may easily avoid the source limitation on such communications by simply ... running the advertisement outside the 30- or 60-day window..." (Brief for Appellees at 92, *McConnell,* 540 U.S. 93.) The FEC explained that interest groups could continue to "run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund." (Brief for Appellees at 95, n. 40, *McConnell,* 540 U.S. 93.) BCRA's sponsors agreed: "[T]he electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches, billboards, yard signs, phone banks, and door-to-door campaigns all fall outside its narrow scope..." (Brief for Intervenor-Defendants at 158, *McConnell,* 251 F.Supp 2d 176.)

When Congress revises a statute, its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms. *See Cottage Sav Ass'n v Comm'r,* 499 U.S. 554, 562 (1991). The administrative agency that interprets and enforces the law has no authority to effectuate "amendments" that Congress considered but abandoned. Post-*McConnell*, only Congress may seek to expand government regulation beyond express advocacy and "electioneering communications," and in order to do so it would have to craft the statute in a manner that demonstrates that the additional restriction is not unconstitutionally vague and is narrowly tailored to serve the requisite governmental interest, as McConnell so found regarding "electioneering communications." *Anderson v Separ,* No. 02-5529, slip op. at 22 (6th Cir. Jan 16, 2004).

Thus, existing law remains unchanged in this area, as it has for thirty years. The Commission has no reason or Congressional authority to unsettle this area of the law in an enforcement action.

2. No judicial precedent from *Buckley v. Valeo* through *McConnell v. FEC* changed the definition of political committee.

The FEC acknowledges in a recent Notice of Proposed Rulemaking (NPRM) that since *Buckley,* neither Congress nor the FEC has amended the FECA to change the definition of "political committee." NPRM, 69 Fed. Reg. 11,736-37.

In *Buckley*, the Court was concerned that the term "political committee...could be interpreted to reach groups engaged purely in issue discussion," noting that lower courts had

interpreted the term "more narrowly" to include only those groups whose major purpose is the nomination or election of Federal candidates. *Buckley*, 424 U.S. at 79-80. In addition, the Court construed the definition of "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Similarly, the Court construed "contributions" as only those donations that would be used to make contributions to candidates, to make express advocacy communications, or to make expenditures coordinated with candidates. *Buckley*, 424 U.S. at 77-78, 80.

The Supreme Court construed the "political committee" reporting requirements to apply only to those groups controlled by Federal candidates or to those groups that receive "contributions" or make "expenditures" in excess of $1,000 and whose major purpose is the nomination or election of a federal candidate. *Buckley,* 424 U.S. at 663. Thus, the major purpose test in *Buckley* was a limitation on the number of groups that might otherwise qualify as political committees because they received "contributions" or made "expenditures" in excess of $1,000.

In *FEC v GOPAC,* 917 F.Supp. 851 (D.D.C. 1996), the District Court specifically rejected the Commission's attempt to treat GOPAC as a Federal political committee. GOPAC's avowed purpose was to support Republican candidates for State legislatures, so that ultimately Republicans could "capture the U.S. House of Representatives." *GOPAC,* 917 F.Supp. at 854. The District Court rejected the FEC's position and concluded that under *Buckley*, an organization is a "political committee" only "if it receives contributions and/or makes expenditures of $1,000 or more **and** its major purpose is the nomination or election of a particular candidate or candidates for federal office." *GOPAC,* 917 F.Supp. at 859 (emphasis added). The FEC declined to appeal this decision. This interpretation was reaffirmed, post-*McConnell*, in *FEC v Malenick*, Civ. No. 02-1237, slip. op. at 8, (D.D.C. Mar. 30, 2004) (order granting summary judgment).

In December 2003, the Supreme Court in *McConnell* upheld the constitutionality of BCRA, but did not reinterpret the definitions of "political committee" or "expenditure," contrary to the assertions made by some campaign finance reformers such as Bush/Cheney.[25] While the

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[25] In laying out the history of the Courts' rulings interpreting these key statutory terms, the *McConnell* Court said. In *Buckley* we began by examining 11 U S C § 608(e)(1) (1970 ed Supp IV), which restricted expenditures "'relative to a clearly identified candidate,'" and we found that the phrase "'relative to' was impermissibly vague " 424 U S , at 40-42 We concluded that the vagueness deficiencies could "be avoided only by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate " *Id* At 43, 96 S Ct 612 We provided examples of words of express advocacy, such as "'vote for,' 'elect,' 'support,' 'defeat,' [and] 'reject,'" *Id* At 44 n 52, and those examples eventually gave rise to what is now known as the "magic words" requirement

We then considered FECA's disclosure provisions, including 2 U S C §431([9]) (1979 ed Supp IV), which defined "'expenditur[e]' to include the use of money or other assets 'for the purpose of influencing' a federal election '" *Buckley*, 424 U.S , at 77 Finding the 'ambiguity of this phrase" posed "constitutional problems," *ibid*, we noted our "obligation to construe the statute, if that can be done consistent with the legislature's purpose, to avoid the shoals of vagueness," *id* At 77-78 (citations omitted) "To insure that the reach" of the disclosure requirement was "not impermissibly broad, we construe[d] 'expenditure' for the purpose of that section in the same way we construed the terms of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate " *Id* At 80 (footnote omitted) *McConnell*, 124 S Ct at 688 (footnote omitted)

MCFL applied the same construction to the ban, at 2 U S C § 441b, on any corporate or labor union "' expenditure in connection with any [federal] election '" 479 U S at 249 See *McConnell,* 124 S Ct at 688 n 76

Court seems to suggest in *McConnell* that it may be constitutional for **Congress** to re-write the definitions of "political committee" or "expenditure" in the future to cover more than just express advocacy, the Court specifically re-affirmed that under current law, 527 groups "remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)." 124 S.Ct. at 686 (emphasis added). Thus, the *McConnell* Court – like Congress – did not change the definitions of expenditure or political committee

This view of the law is supported unequivocally by statements of Commissioners, Sponsors of the law and Members of Congress made during the passage of BCRA.

C. Conclusion

Accordingly, OGC's application of the "major purpose" test is misplaced and misapplied. In fact, under the law in effect in 2004, including the statute, regulations, opinions, enforcement matters, and relevant court cases, it is clear that this test has never been adopted as determinative of when a nonfederal committee is required to register with the Commission as a federal political committee. Until such time as the law is appropriately changed to reflect the "major purpose" test, none of TFT's activities triggered registration with the Commission as a federal political committee, and the Commission should decline to find probable against TFT on this basis. The Commission should not find probable cause to believe where, as here, the only information presented by OGC consists of a handful of email solicitations, which is Internet activity otherwise exempt from the Act.

Based on the foregoing, TFT did not exceed the $1,000 threshold for political committee status, as set forth in the Act, and did not receive in excess of $1,000 in federal contributions or make in excess of $1,000 in express advocacy expenditures. Consequently, TFT had no duty to register as a federal political committee with the Commission, and no excessive contributions were received. To the contrary, all email solicitations made by TFT were exempt as Internet activity, and all funds received were legal nonfederal contributions made under the law applicable in 2004.

Thus, the Commission should find no probable cause to believe that Texans for Truth violated any provision of the Act or Commission regulations and should close this matter as expeditiously as possible.

Respectfully submitted,

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